No. 11924

United States

Circuit Court of Appeals

For the Ninth Circuit.

A. G. ROLE,

Appellant,

vs.

J. NEILS LUMBER COMPANY, a corporation, and United States of America,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Montana

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

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Helena, Montana,
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Billings, Montana,
Attorneys for United States of America, Intervenor. [1*]

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* Page numbering appearing at foot of page of original certified Transcript of Record

In the District Court of the United States in and for the District of Montana, Great Falls Division

No. 948

A. G. ROLE,

Plaintiff,

vs.

J. NEILS LUMBER COMPANY, a Corporation,

Defendant,

and

UNITED STATES OF AMERICA,

Intervenor.

Be It Remembered, that on April 10, 1947, a Complaint was duly filed herein, in the words and figures following, to wit: [2]

COMPLAINT

The plaintiff, for claim and demand against the above named defendant, alleges:

I.

That the plaintiff, at all times herein alleged, was an employee of the defendant and that he has been duly authorized and designated in writing by the persons named in Schedule "A", hereto annexed, to maintain this action as their agent and representative and that he brings this action for himself and for all other employees of the defendant who are or were situated similarly to himself and those named in Schedule "A" who may join in this action

by intervention, amendment, designation or otherwise.

II.

This action arises under the provisions of the Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. A., Secs. 201-219, known as the Fair Labor Standards Act of 1938, a law of the United States regulating interstate commerce, and jurisdiction of this action rests in this Court under the authority of 28 U. S. C. A., Section 41 (8) and Section 16 (b) of the Fair Labor Standards Act, 29 U. S. C. A., Section 216 (b).

III.

The defendant, J. Neils Lumber Company, hereinafter referred to and called "the company" is now and at all times herein alleged was a corporation organized and existing under [3] the laws of the State of Minnesota and duly qualified to do business within the State of Montana with its principal place of business at Libby, Montana, and is engaged in logging and producting various lumber products for sale primarily in interstate commerce. That plaintiff and the employees whose names are set forth in Schedule "A" and all those similarly situated who hereafter join in this action, are or were at all times herein alleged engaged in defendant's logging operations at or in the vicinity of Troy, Libby, and Warland, Montana, and said employees at all times materially hereto were engaged in the production of goods, to wit: logs and poles for interstate commerce and in processes and occupations necessary to such production of said goods

and products for the defendant in interstate commerce.

IV.

The defendant, at all times herein mentioned, conducts extensive logging operations near Troy, Montana, and near Warland, Montana, with shops and supply rooms at Troy for the Troy operations and at Warland for the Warland operations. That in connection with such operations, the defendant has built and maintained extensive roads in the forests where the logging operations are maintained. That the employees live in Libby, Troy or Warland. That to transport the employees to the logging operations, defendant operates buses from Libby, Troy and Warland and the employees are regularly transported on each working day from Libby, Troy and Warland to the logging operations and returned by the defendant in such buses.

V.

Since on or about April 10, 1945, the defendant company has employed the employees, herein suing and represented, and those similarly situated who may hereafter join in this action *in this action,* in the production of goods for [4] interstate commerce as aforesaid for work weeks longer than forty hours and has failed and refused to compensate said employees for their employment in excess of forty hours in such work weeks at rates not less than one and one-half times the rates at which said employees were employed. The time for which defendant employed said employees as aforesaid in excess

of forty hours per work week and for which defendant did and does fail and refuse to compensate said employees was the time spent by said employees: (a) traveling in the defendant's bus from Libby to Troy and thence to the defendant's logging operation in vehicles furnished by the defendant and subject to the defendant's control prior to 8:00 a.m. on each work day, the said 8:00 a.m. being the regularly scheduled time for the beginning of the work shift in each day; (b) traveling from Libby to Warland and thence to the logging operations of the defendant in vehicles furnished by the defendant and subject to the defendant's control prior to 8:00 a.m. on each work day, the said 8:00 a.m. being the regularly scheduled time for the beginning of the work shift in each day; (c) traveling from the defendant's logging operations under the defendant's control and direction after 4:30 p.m. on each work day, the said 4:30 p.m. being the designated and of the regular work shift to Troy and to Libby; (d) traveling from the defendant's logging operations under the defendant's control and direction after 4:30 p.m. on each work day, the said 4:30 p.m. being the designated end of the regular work shift to Warland and Libby; (e) in obtaining, handling, carrying, caring for and putting away tools and receiving orders and notices for the conduct of the business of defendants prior to 8:00 a.m. and after 4:30 p.m. each work day at Troy and at Warland and at the sites of the logging operations of defendant and between [5] said camp and said sites, said 8:00 a.m. being the designated time for

the beginning of each work shift and the said 4:30 p.m. being designated as the time for the ending of each work shift; that all of said work was performed prior to the scheduled starting time fixed by the defendant or subsequent to the scheduled quitting time fixed by the defendant. That such time so worked as aforesaid required the expenditure of mental and physical energy and labor by the employees herein suing and others similarly situated and who may hereafter join in this action as aforesaid, and such physical energy and labor are essential, necessary for, and required by the very character and nature of the work performed by the employees and were and are pursued necessarily and primarily for the use and benefit of the defendant and its business and were and are required and controlled by the defendant and as such constitutes work and labor within the meaning of the Fair Labor Standards Act of 1938.

VI.

During each week since April 10, 1945, to the date of filing this Complaint the hours between the scheduled starting times and quitting times added to the periods which the employees were required to work or were suffered or permitted to work prior to scheduled starting times and subsequent to scheduled quitting times, as hereinbefore set forth, have totalled in excess of forty hours per week and during each of said weeks the defendant has failed and refused to pay to the said employees any compensation or to compensate them at one and one-half (½)

times the regular rate of pay for all hours worked in excess of forty hours per week as herein set forth.

VII.

Plaintiff is not informed as to the exact amount [6] of overtime work rendered by each of the employees or the wages still due and owing for overtime hours worked for which no payment was made in violation of the Fair Labor Standards Act of 1938; that such information is not available to the employees who are represented in this action but records including such information are, or should be, under the provisions of said Fair Labor Standards Act, in exclusive possession of the defendant. That interrogatories are attached hereto which plaintiff respectfully asks the Court on behalf of himself and those named in Schedule "A" and all others who may hereafter join in this action, as aforesaid, to counsel defendant to answer.

Wherefore, plaintiff demands judgment in favor of the plaintiff and against the defendant for:

1. A determination of the amount due for labor performed and time spent by each employee for whom this action is brought, as herein alleged;
2. The respective amounts so determined;
3. An equal additional amount as liquidated damages;
4. Court costs and reasonable attorney's fees;
5. That defendant answer the Interrogatories hereto annexed and account to all employees

joined herein for the wages due them for overtime since April 10, 1945;

6. Such other and further relief as may be just and proper in the premises.

LEIF ERICKSON,
H. L. MAURY,
A. G. SHONE,
Attorneys for Plaintiff.

Complaint drawn by: Leif Erickson, Union Bank Bldg., Helena. [7]

INTERROGATORIES

Give for the plaintiff and for each employee named in Schedule "A" attached to the complaint for each work week subsequent to April 10, 1945, to the date of the filing of the complaint:

1. The job classification.
2. The scheduled starting and quitting times.
3. The total number of hours worked.
4. The total number of hours for which compensation was paid.
5. The regular hourly rate or the base and rate of pay if not on a regular hourly rate basis.
6. The number of hours compensated at overtime rates.
7. The total amount paid.
8. The scheduled departure time; or in the absence of a scheduled departure time, the approximate or usual departure time of the applicable vehicle of defendant used to transport the employee from Libby, Troy or Warland, as the case may be, to the sites of the

actual active logging operations as the case may be.

9. The scheduled arrival time; or, in the absence of a scheduled arrival time, the approximate or usual arrival time at Troy, Libby or Warland, as the case may be, of the applicable vehicle of defendant used to transport the employee after the scheduled Court time, from the sites of actual active logging operations as the case may be. [8]

SCHEDULE "A"

Anderson, Vester
Augu, Louis H.
Bailey, Van O.
Barrett, Patrick R.
Benefield, Clay E.
Brown, Clarence
Brown, James
Carlson, Oscar
Carr, J. A.
Carvey, Edward F.
Caudill, Wm.
Childs, Roland
Cole, Francis E.
Conrad, Lawrence
Cook, Ottis A.
Cripe, Frank
Cripe, Rufus
Croucher, Francis
Decker, Harold M.
Dennis, Robert J.
Deyerle, Earl
Docken, Bernt
Evans, Roy L.
Flight, Ray A.
Goodgame, Allen
Hagen, Andrew
Hammons, Fred J.
Hanson, Howard E.
Hartsock, William
Haugset, Einar
Johnson, Robert L.
Johnston, Joe
Jones, Arthur P.
Keller, Gerald
Kimber, Vernon M.
Kudbow, Delbert
Larson, Bunnar
LeCount, V. L.
Madison, Dewey D.
Martius, John P.

Martin, Arthur P., Jr.
Martin, Elmer W.
McCann, Mike
McColley, A. L.
McGill, Darrell N.
Militan, Joe
Montgomery, Frank
Mortinick, Mike
Munro, H. J.
Nead, Ralph D.
Nellis, Marvin B.
Nellis, W. E.
Nelson, Fred D.
Nelson, John H.
Nelson, Tom E.
Nocerini, Roy N.
O'Brien, Fred D.
Orr, Carl
Ostheller, E. C.
Page, Rollin J.
Parker, Dan
Pamenter, Edgar A.
Pearson, Walter E.
Pearson, Wm. C.
Peck, Arthur F.
Perry, Wm. C., Jr.
Plotts, Robert
Poesing, Thos.
Ptuekee, Stein
Radan, N. R.
Rice, Wm. H.
Sandous, James B.
Schafer, Fred
Schumerhorn, Wm. R.
Shaupatser, J. T.
Shiflett, Calvin
Skranak, Geo. J.
Smith, Richard K.
Smith, Wm.
Spencer, Ernest
Spencer, Forrest F.
Spencer, Kenneth C.
Spencer, Leonard
Spencer, Ralph E.
Spencer, Vern
Stevens, Geo.
Stone, Matthew
Stout, Herbert M.
Sweet, Franklin C.
Thomason, Roy M.
Torbert, L. V.
Tumis, Nicholas
Vinion, John S.
Walters, Clarence E.
Walker, Dale
Young, Albert R.
Zimmerman, Walter P.
Zimmerman, M. C.

[Endorsed]: Filed April 10, 1947. [9]

Thereafter, on May 3, 1947, a stipulation to amend Complaint by interlineation was duly filed herein, being in the words and figures following, to wit: [10]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties hereto through their respective attorneys as follows:

1. That the complaint of plaintiff may be amended by interlineation or otherwise in the following particulars:

By striking from the complaint the words and figures "June 25, 1940," wherever the same appear, and substituting therefor the words and figures "April 10, 1945," in each instance, and the Clerk is hereby authorized to make such amendment on the face of the complaint in each of the following places:

Page 2, Paragraph V, line 29.

Page 4, Paragraph VI, line 19.

Page 5, Paragraph 5 of the prayer in lines 23 and/or 24.

Line 4 of the page entitled "Interrogatories."

2. That the defendant may have to and including the 31st day of May, 1947, in which to appear and to plead to the complaint.

3. That defendant may have to and including the 31st day of May, 1947, to file objections to the

interrogatories, including but not limited to the right to object on the ground that said interrogatories [11] are premature.

Dated this 2nd day of May, 1947.

LEIF ERICKSON,
H. L. MAURY,
A. G. SHONE,
By LEIF ERICKSON,
Attorneys for Plaintiff.

Address: 17 Union Bank Building, Helena, Montana.

CHARLES A. HART,
ART JARDINE,
S. B. CHASE, JR.,
JOHN D. STEPHENSON,
By /s/ S. B. CHASE, JR.,
Attorneys for Defendant.

[Endorsed]: Filed May 3, 1947. [12]

Thereafter, on May 5, 1947, an order to amend the complaint by interlineation was duly filed, entered and noted in the civil docket, in the words and figures following, to wit: [13]

[Title of District Court and Cause.]

ORDER

Pursuant to stipulation of counsel for the respective parties, and the Court being fully advised,

It Is Hereby Ordered:

1. That the complaint of plaintiff may be amended by interlineation or otherwise in the following particulars:

By striking from the complaint the words and figures "June 25, 1940," wherever the same appear, and substituting therefor the words and figures "April 10, 1945," in each instance, and the Clerk is hereby authorized to make such amendment on the face of the complaint in each of the following places:

Page 2, Paragraph V, line 29.

Page 4, Paragraph VI, line 19.

Page 5, Paragraph 5 of the prayer in lines 23 and/or 24.

Line 4 of the page entitled "Interrogatories."

2. That the defendant may have to and including the 31st day of May, 1947, in which to appear and to plead to the complaint.

3. That defendant may have to and including the 31st day of May, 1947, to file objections to the interrogatories, including but not limited to the right to object on the ground that said interrogatories are premature.

Given and Made this 5th day of May, 1947.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed May 5, 1947. [14]

Thereafter, on June 9, 1947, an Answer was duly filed herein, in the words and figures as follows, to wit: [15]

[Title of District Court and Cause.]

ANSWER

Now comes defendant, J. Neils Lumber Company, a corporation, and answers the complaint herein as follows:

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

I.

Answering paragraph I of the complaint, defendant states that it has no knowledge or information sufficient to form a belief as to the authority alleged to have been given by the persons named in Schedule A attached to the complaint. Defendant alleges that none of the persons listed in said Schedule A has filed in this Court his consent in writing to become a party to this action.

II.

Defendant admits that this action is brought pursuant to provisions of the Fair Labor Standards Act of 1938, but defendant alleges that this Court has no jurisdiction of the subject matter of this action because of the provisions of the Portal-to-Portal Act of 1947, which became effective on May 14, 1947. [16]

III.

Defendant admits that it is a corporation organized and existing under the laws of the State of Minnesota and is duly qualified to do business within the State of Montana, as alleged in paragraph III of the complaint. Defendant admits that certain of the employees listed in Schedule A attached to the complaint, but not plaintiff, were employed in defendant's logging operations in the vicinity of Troy or in the vicinity of Warland, Montana. Defendant admits that during the times referred to in the complaint it was engaged in the manufacture of lumber and lumber products a large portion of which was shipped in interstate commerce, and admits that its logging operations were carried on for the purpose of producing logs for use in defendant's manufacture of lumber and other products.

Except as so admitted, defendant denies each and every allegation of paragraph III of the complaint.

IV.

Defendant admits that during the times referred to in the complaint it conducted logging operations in the vicinity of Troy, Montana, and in the vicinity of Warland, Montana, and that it built and maintained roads for the purpose of reaching said logging operations. Defendant admits that certain of its employees lived in Libby, Troy, and Warland, or in the vicinity thereof. Defendant admits that it has operated buses for the purpose of transporting its employees between Troy and the log-

ging operations adjacent thereto, and between Warland and the logging operations adjacent thereto, but defendant denies that it has operated buses between Libby and Troy or between Libby and Warland.

V.

Defendant admits that during the times referred to in [17] the complaint it provided transportation for those of its employees who desired to use such transportation between Troy and defendant's logging operations in the vicinity of Troy, and between Warland and defendant's logging operations in the vicinity of Warland, and that the transportation to and from the logging operations occurred prior to the regularly scheduled time for the beginning of the work shift for each day and at the end of the scheduled time for such work shift.

Except as so admitted, defendant denies each and every allegation of paragraph V of the complaint.

VI.

Defendant admits that it has not made payment to its employees for the time spent in traveling to and from the logging operations at which its employees worked.

Except as so admitted, defendant denies each and every allegation of paragraph VI of the complaint.

VII.

Defendant admits that its records disclose the amount of time worked by each of its employees during the periods referred to in the complaint.

Except as so admitted, defendant denies each and every allegation of paragraph VII of the complaint.

Third Defense

I.

Defendant alleges that at all times when the persons listed in Schedule A of the complaint worked in its logging operations subsequent to April 10, 1945, there was in effect a collective bargaining agreement between defendant and a union which was the duly designated bargaining agent of defendant's employees and which union each of the employees listed in Schedule A is or was a member. Said agreement [18] constituted the contract of employment between defendant and each of said employees and prescribed the terms and conditions of said employment. Said contract required no work or service of any of said employees prior to their arrival at or after leaving the place of work in the woods and did not contemplate or require any control by defendant as employer over any of said employees while said employees were traveling to and from the place of work; and in the performance of said contract during all of the times referred to in the complaint, no work or service was required of or was rendered by any of said employees during said traveling period and no control was exercised by defendant as employer over any of said employees during said traveling period.

II.

Defendant alleges that none of the employees referred to in the complaint performed any work

or service or duty for defendant other than as required or contemplated by said contract of employment, and each and all of said employees have been paid in full for all hours of employment in defendant's service.

Fourth Defense

Defendant alleges that during all the times referred to in the complaint the work required of defendant's employees and the compensation to be paid therefor were fixed by a valid contract of employment, and that under said contract of employment the time spent by defendant's employees in traveling to and from their place of work was not hours of employment or work time; and defendant alleges that the Fair Labor Standards Act of 1938, if interpreted as invalidating said contract, will deprive defendant of its property without due process of law, [19] contrary to the provisions of the Fifth Amendment to the Constitution of the United States, and is therefore invalid and unenforcible.

Fifth Defense

Defendant alleges that time spent by its employees in traveling to and from the place at which their regularly scheduled work was carried on and in obtaining, handling, carrying, caring for, and putting away tools, and receiving orders and notices, for which compensation is demanded in the complaint herein, was not compensable either (1) by any provision of a written or non-written contract then in effect between said employees and their collective

bargaining representatives and defendant, or (2) by any custom or practice then in effect between said employees and defendant; and defendant alleges that under the provisions of the Portal-to-Portal Act of 1947, which became effective May 14, 1947, defendant is not liable for the claims asserted in the complaint herein.

Wherefore defendant prays that judgment be entered dismissing this action and awarding defendant costs and its disbursements herein.

ART JARDINE,
S. B. CHASE,
JOHN D. STEPHENSON,
Attorneys for Defendant.

Of Counsel:
JARDINE, CHASE & STEPHENSON,
CHARLES A. HART,
HART, SPENCER, McCULLOCH & ROCKWOOD,
Portland, Oregon.

[Endorsed]: Filed June 9, 1947. [20]

Thereafter, on June 10, 1947, Suggestion of Lack of Jurisdiction and Motion for Judgment on Pleadings was duly filed herein, being in the words and figures follows, to wit: [21]

[Title of District Court and Cause.]

SUGGESTION OF LACK OF JURISDICTION AND MOTION FOR JUDGMENT ON PLEADINGS

Now comes defendant and suggests that the Court lacks jurisdiction of the subject matter of this action for the following reasons:

The action seeks to impose liability upon defendant pursuant to the Fair Labor Standards Act of 1938 (29 U.S.C.A. Sections 201-219, inclusive) to recover compensation for activities which were not compensable either by an express provision of a written or non-written contract of employment between defendant and the employees for whom the action is brought, or by any custom or practice covering such activities in effect between defendant and such employee. Under the provisions of subsection (d) of Section 2 of the Portal-to-Portal Act of 1947, which became effective May 14, 1947, this Court is deprived of jurisdiction of any action or proceeding to enforce any such liability as that asserted in the complaint.

In the alternative, defendant moves for judgment on the pleadings herein and in support of said motion respectfully shows:

The pleadings disclose that this action is brought on behalf of employees of defendant to recover compensation for or on account of activities which were not compensable either by an express provision of a written or non-written contract of employment between defendant and such employees, or by any

custom or practice covering such activities in effect between defendant and such employees.

Subsection (a) of Section 2 of the Portal-to-Portal Act of 1947, which became effective May 14, 1947, provides that no employer shall be subject to any such liability as that sought to be imposed upon defendant in this action.

/s/ ART JARDINE,
/s/ JOHN D. STEPHENSON,
/s/ S. B. CHASE, JR.,
Attorneys for Defendant.
By S. B. CHASE, JR.

Of Counsel
JARDINE, CHASE & STEPHENSON,
Great Falls, Montana, 410 First National Bank Bldg.
CHARLES A. HART,
HART, SPENCER, McCULLOCH & ROCKWOOD,
Portland, Oregon.

[Endorsed]: Filed June 10, 1947. [23]

Thereafter, on October 31, 1947, Motion of the United States to Intervene and for time to file brief, etc., was duly filed herein, being in the words and figures following, to wit: [24]

[Title of District Court and Cause.]

MOTION OF THE UNITED STATES TO INTERVENE AND FOR TIME WITHIN WHICH TO FILE A BRIEF IN SUPPORT OF THE CONSTITUTIONALITY OF THE PORTAL-TO-PORTAL ACT OF 1947 AND THE FAIR LABOR STANDARDS ACT OF 1938

Now comes the United States of America, by its Attorney General and pursuant to the Act of August 24, 1937 (c. 754, sec. 1, 50 Stat. 751, 28 U.S.C. § 401), moves to intervene and become a party to this action for the purposes and with all the rights provided by said Act of August 24, 1937, upon the ground that the constitutionality of the Portal-to-Portal Act of 1947, approved May 14, 1947, and of the Fair Labor Standards Act of 1938, approved June 25, 1938, has been drawn in question in this action, and neither the United States nor any agency thereof, nor any officer or employee thereof, as such officer or employee, is a party hereto.

The United States further moves that the Court receive its pleading, entitled "Pleading of the United States in Intervention," which accompanies this motion in accordance with Rule 24(c) of the Federal Rules of Civil Procedure, as its appearance in this action in support of the constitutionality of the said Portal-to-Portal Act of 1947 and the said Fair Labor Standards Act of 1938 and in opposition to all pleadings, motions, and proceedings of any of the parties hereto, denying the validity of the said

Acts, or any part thereof, upon the ground that they are unconstitutional. [25]

The United States moves also for leave to file a brief within 30 days after service upon it of plaintiff's brief or such other time as the Court may deem reasonable.

TOM C. CLARK,
Attorney General.
By /s/ HERBERT A. BERGSON,
Acting Assistant Attorney General.
/s/ JOHN B. TANSIL,
United States Attorney.

Of Counsel:
ENOCH E. ELLISON,
Special Assistant to the Attorney General.
JOHANNA M. D'AMICO,
Attorney, Department of Justice.

[Endorsed]: Received and filed Oct. 31, 1947.

Thereafter, on October 31, 1947, Order granting leave to the United States of America to intervene was duly entered in the minutes of the Court, in the words and figures following, to wit: [27]

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO UNITED STATES TO INTERVENE

At this time Mr. Franklin A. Lamb, Assistant United States Attorney, filed and presented to the

Court a motion of the United States for leave to intervene herein, and for time within which to file a brief in support of the constitutionality of the Portal-to-Portal Act of 1947, and the Fair Labor Standards Act of 1938, whereupon Court ordered that said motion be and is granted. Thereupon a pleading of the United States in intervention was filed by Mr. Lamb.

Entered in open Court at Billings, Montana, October 31, 1947.

H. H. WALKER,
Clerk. [28]

Thereafter, on October 31, 1947, Pleading of the United States in Intervention was duly filed herein, being in the words and figures following, to wit:

[Title of District Court and Cause.]

PLEADING OF THE UNITED STATES IN INTERVENTION

The United States of America, intervenor herein, for its pleading in intervention, says:

1. That intervenor is not required to answer the factual allegations of the parties to this action and, therefore, neither admits nor denies such allegations.
2. That the Portal-to-Portal Act of 1947, approved May 14, 1947, and the Fair Labor Standards Act of 1938, approved June 25, 1938, conforms in all respects to the provi-

sions and requirements of the Constitution of the United States and are existing and valid laws of the United States.

3. That the constitutionality of the said Portal-to-Portal Act of 1947 and the said Fair Labor Standards Act of 1938 is not subject to serious question but if the Court should entertain serious doubts concerning the constitutionality of these Acts, it should first consider the other defenses raised by the defendant, and, if it finds that any such defense or defenses bar all the claims herein, it should dismiss the action without ruling on the constitutional question. [30]

Wherefore, the United States of America prays that the Court enter a judgment herein which shall be consistent with the constitutional validity of the said Portal-to-Portal Act of 1947 and the Fair Labor Standards Act of 1938.

TOM C. CLARK,
Attorney General.
By /s/ HERBERT A. BERGSON,
Acting Assistant Attorney General.
/s/ JOHN B. TANSIL,
United States Attorney.

Of Counsel:
ENOCH E. ELLISON,
Special Assistant to the Attorney General.
JOHANNA M. D'AMICO,
Attorney, Department of Justice.

[Endorsed]: Filed Oct. 31, 1947. [31]

Thereafter, on December 19, 1947, the Decision of the Court was duly filed herein, being in the words and figures following, to wit: [32]

In the District Court of the United States in and for the District of Montana, Great Falls Division

Civil Action No. 948

A. G. ROLE,

Plaintiff,

vs.

J. NEILS LUMBER COMPANY, a Corporation,

Defendant.

DECISION OF THE COURT

This action was commenced April 10, 1947, under the Fair Labor Standards Act of 1938 (29 U. S. C. A. 201-219). The defendant is a corporation engaged in logging operations in Montana and in producing various kinds of lumber products for sale and shipment in interstate commerce. That since about April 10, 1945, the employees of defendant, herein suing and represented, and others similarly situated who may later join in this action, have been engaged in the production of goods for interstate commerce, and in so-called portal-to-portal activities for work weeks longer than forty hours for which defendant has failed and refused to compensate them for such excess labor at rates not less than one and one-half times the rates at which said employees were employed.

Defendant alleges that this court has no jurisdiction of the subject matter of the complaint herein because of the provisions of the Portal-to-Portal Act (29 U. S. C. A. 251 et seq.) which became effective May 14, 1947, and "that the time spent by its employees in traveling to and from the place at which their regularly scheduled work was carried on and in obtaining, handling, carrying, caring for, and putting away tools, and receiving orders and notices, for which compensation is demanded in the complaint herein, was not compensable either (1) by any provisions of a written or non-written contract then in effect between said employees and their collective bargaining representative and [33] defendant, or (2) by any custom or practice then in effect between said employees and defendant"; and that defendant is not liable for the claims asserted in the complaint under the provisions of the Portal-to-Portal Act of 1947.

In response to this defense, plaintiff asserts that "Part II of Public Law 49 (the Portal-to-Portal Act) contravenes the Fifth Amendment of the Constitution of the United States which prohibits 'the taking of property without due process of law,' and that subsections a, b and c of Section 2 are retrospective legislation whose objects is to destroy existing vested rights without due process"; also that the Portal-to-Portal Act attempts to redefine working time which is a judicial and not a legislative act and would be in violation of Article 3 of the Constitution.

Congress enunciated its policy and findings in Section 1 of the Portal-to-Portal Act which the courts have uniformly held do not constitute a usurpation of judicial power, and are not in conflict in any way with the findings and policy of Congress contained in Section 2 of the Fair Labor Standards Act, upon which the "portal-to-portal" claims are based. Does this Act infringe upon the decision in the Mt. Clemens Pottery case; it does not so appear from the language of the Act itself; contracts and practices which arose in pursuance of the terms of the Fair Labor Standards Act remained undisturbed; final judgments for "portal-to-portal" pay, where unpaid, are valid obligations.

In approving this legislation Congress was dealing with present existing conditions which the Act was intended to remedy, and in its operation was prospective rather than retrospective; while it dealt with claims based upon former legislative acts they were still existing claims at the time the Portal-to-Portal Bill was enacted. The Supreme Court held that the activities in question were compensable, subject to the "de minimis" doctrine. The claims in the Gold Clause case had also been sustained in the courts, Norman v. Baltimore & Ohio R. R. Co., 294 U. S. 240; [34] Gregory v. Morris, 96 U. S. 619. "Portal-Portal" claims based upon contract are still enforceable and no bar thereto is interposed by the Portal-to-Portal Act; but it seems to be clearly established that employers are no longer liable for payment of such claims where they rest solely upon the prior Act. Congress may repeal

a statute granting gratuities and imposing penalties, and unless a saving clause is included, all prior liability thereunder is thereby terminated. Norris v. Crocker, 13 Howard 429, 440; U. S. v. Chambers, 291 U. S. 217, 222-226, and cases there cited; Lynch v. U. S., 292 U. S. 571, 577; Flanigan v. Sierra County, 196 U. S. 553, 560. The "Portal-to-Portal" benefits of the Labor Act came as a "windfall" to employees, and may be considered as purely statutory benefits, and at all times subject to the legislative will that created them. McNair v. Knott, 302 U. S. 369, 372, 374 (and cases there cited); Chase Securities Corp. v. Donaldson, 325 U. S. 304, 311-312, 314-316; Louisiana v. Mayor, 109 U. S. 285, 287-288; In re Hall, 167 U. S. 38, 42; Ewell v. Daggs, 108 U. S. 143, 151.

The Attorney General has convincingly demonstrated that "insofar as rights given by the Fair Labor Standards Act have not, in fact, become terms of employment contracts they may be withdrawn by the Congress. Section 2 of the Portal-to-Portal Act of 1947 which relieves employers of the liability of the so-called portal-to-portal claims goes no further and is clearly constitutional. Even without its plenary power to terminate the portal-to-portal claims by withdrawing their legislative support, the Congress clearly had the power to do so through exercise of its powers over interstate commerce." In a lengthy and exhaustive brief the Attorney General has cited abundant authority to sustain his position.

Contracts between private parties are entered

into subject to existing laws of the United States, and also any changes which Congress may lawfully make in them. Louisville & Nashville R. R. v. Mottley, 219 U. S. 467; [36] also Gold Clause case; Kline v. Burke Construction Co., 260 U. S. 226, 234.

Able and persuasive arguments have been submitted by counsel for the respective parties, and by the Attorney General of the United States, who intervened under the Congressional Act of 1937, 28 U. S. C. A. Sec. 401, all of which the court has carefully considered, together with many decisions by other courts throughout the country relating to the questions involved in the present action, and with the result that this court is fully convinced from the arguments of counsel and authorities cited, and from able decisions rendered by other courts embracing like issues, that the motion of defendant's counsel should be granted on both grounds therein set forth, and such is the order of the court herein, with exceptions allowed counsel for plaintiff.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed Dec. 19, 1947.

Thereafter, on December 30, 1947, Order dismissing action was duly filed, entered and noted in the civil docket, being in the words and figures following, to wit: [37]

[Title of District Court and Cause.]

ORDER

This action came before the Court upon the suggestion of defendant that pursuant to the "Portal-to-Portal Act of 1947" the Court is without jurisdiction and upon the motion of defendant, in the alternative, that the action be dismissed with prejudice. In support of defendant's motion, the Attorney General has intervened under the Act of 1937 (28 U. S. C. A. Section 401). The Court having heard and considered the arguments of the parties for and against the suggestion of lack of jurisdiction and the motion and having considered the brief filed by the Attorney General following his intervention, and the parties having stipulated that the action does not involve an activity compensable pursuant to an express provision of a written or non-written contract in effect at the time of the activity alleged, nor an activity heretofore compensable by any custom or practice in effect at the establishment or other place where the claimants were employed covering such activity, and the Court being fully advised in the premises, concludes as follows:

1. That pursuant to subsections (a) and (b), Part II, Section 2 of the "Portal-to-Portal Act of 1947," Public Law 49, 80th Congress, the defendant is not subject to liability or punishment or to pay overtime compensation for the activities involved herein.
2. That the activities upon which these claims

in this action are based are not such activities as are compensable under subsections (a) and (b), [38] Part II, Section 2 of the "Portal-to-Portal Act of 1947," Public Law 49, 80th Congress, and therefore this Court, pursuant to subsection (d) of said Section 2, has no jurisdiction to enforce any liability or impose any punishment therefor.

3. That the Court is without jurisdiction to grant the relief prayed for in the complaint.

Wherefore, it is Ordered and Decreed that the above entitled action be and the same is hereby dismissed with prejudice and an exception is hereby allowed to plaintiff.

Dated this December 30th, 1947.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed, entered and noted in the Civil Docket December 30, 1947.

Thereafter, on March 29, 1948, Notice of Appeal was duly filed herein, being in the words and figures following, to wit: [40]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice is hereby given that A. G. Role, Plaintiff, above named, hereby appeals to the Circuit Court

of Appeals, Ninth Circuit, from the Order of Dismissal entered in this action on the 30th day of December, 1947.

Dated this 26th day of March, 1948.

LEIF ERICKSON,
H. LOWNDES MAURY,
A. G. SHONE,
Attorneys for Appellant.

[Endorsed]: Filed March 29, 1948.

Thereafter, on April 20, 1948, Designation by defendant of additional portions of the records and proceedings to be contained in the record on appeal was duly filed herein, in the words and figures following, to wit: [42]

[Title of District Court and Cause.]

DESIGNATION BY DEFENDANT OF ADDITIONAL PORTIONS OF THE RECORDS AND PROCEEDINGS TO BE CONTAINED IN THE RECORD ON APPEAL

Comes now the defendant, J. Neils Lumber Company, a corporation, and within ten (10) days from the service of the plaintiff's Designation of Record, does hereby designate the following portions of the records and proceedings to be contained in the record on appeal in addition to the matters designated by the plaintiff:

1. Order Permitting Amendment to Complaint by Interlination.
2. Motion of the United States to Intervene and for Time Within Which to File a Brief in Support of the Constitutionality of the Portal-to-Portal Act of 1947 and the Fair Labor Standards Act of 1938.
3. Order granting the United States Leave to Intervene, contained in a Minute Entry dated October 31, 1947.
4. Pleading of the United States in Intervention.

Please endorse the respective dates of filing of the foregoing proceedings in the above entitled court, and as to the [43] Minute Entry of October 31, 1947, please designate the date thereof.

Dated this 20th day of April, 1948.

C. A. HART,
ART JARDINE,
S. B. CHASE, JR.,
JOHN D. STEPHENSON,
By S. B. CHASE, JR.

Of Counsel:

JARDINE, CHASE & STEPHENSON,
Great Falls, Montana.
HART, SPENCER, McCULLOCH & ROCKWOOD,
Portland, Oregon.

[Endorsed]: Filed April 20, 1948. [44]

Thereafter, on April 27, 1948, Statement of Points was duly filed herein, in the words and figures following, to wit: [45]

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which Appellant intends to rely on this appeal are as follows:

1. The Court erred in finding that the defendant is not subject to liability and to pay overtime compensation to the plaintiff and to other workmen similarly situated designated in Schedule "A" attached to the complaint for the activities involved because of the provisions of Subsection (a) and (b), Part II, Section 2 of the "Portal-to-Portal Act of 1947."

2. The Court erred in holding that the activities upon which these claims in this action are based are not such activities as are compensable under Subsection (a) and (b), Part II, Section 2 of the "Portal-to-Portal Act of 1947," Public Law 49, 80th Congress, and, therefore, the Court pursuant to Subsection (d) of said Section 2, has no jurisdiction to enforce any liability or impose any punishment therefor.

3. The Court erred in holding that the Court is without jurisdiction to grant the relief prayed for in the complaint.

4. The Court erred in sustaining defendant's motion for judgment on the pleadings.

5. The Court erred in dismissing the action.

LEIF ERICKSON,
H. L. MAURY,
A. G. SHONE,

[Endorsed]: Filed April 27, 1948. [46]

Thereafter, on April 27, 1948, Designation of Record on appeal was duly filed herein by the appellant, in the words and figures following, to wit:

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Appellant designates the following portions of the record and proceedings to be contained in the record on appeal in this action:

1. Complaint.
2. Stipulation Permitting Amendment of Complaint by Interlineation.
3. Defendant's Answer to Complaint.
4. Defendant's Suggestion of Lack of Jurisdiction and Motion for Judgment on Pleadings.
5. The Opinion of the Court and Order Granting Defendant's Motion.
6. Order of Dismissal.
7. Notice of Appeal.
8. Statement of Points on which Appellant intends to rely.

9. This Designation.

LEIF ERICKSON,
H. L. MAURY,
A. G. SHONE,
Attorneys for Plaintiff.

[Endorsed]: Filed April 27, 1948. [48]

In the District Court of the United States in and for the District of Montana

United States of America,
District of Montana—ss.

CLERK'S CERTIFICATE TO TRANSCRIPT

I, H. H. Walker, Clerk of the District Court of the United States in and for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 49 pages, numbered consecutively from 1 to 49, inclusive, constitutes a full, true and correct transcript of all portions of the record in case number 948, A. G. Role, Plaintiff, versus J. Neils Lumber Company, a corporation, Defendant, and United States of America, Intervenor, designated by the parties as the record on appeal therein, as appears from the original records and files of said Court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Eleven and 40/100ths ($11.40) Dollars, and have been paid by the appellant.

Witness my hand and the seal of said Court at Great Falls, Montana, this 4th day of May, A. D. 1948.

[Seal] H. H. WALKER,
Clerk, United States District Court for the District of Montana.

By /s/ ELIZABETH C. McKEE,
Deputy Clerk.

[Endorsed]: No. 11924. United States Circuit Court of Appeals for the Ninth Circuit. A. G. Role, Appellant, vs. J. Neils Lumber Company, a corporation, and United States of America, Appellees. Transcript of Record Upon Appeal from the District Court of the United States for the District of Montana.

Filed May 6, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.